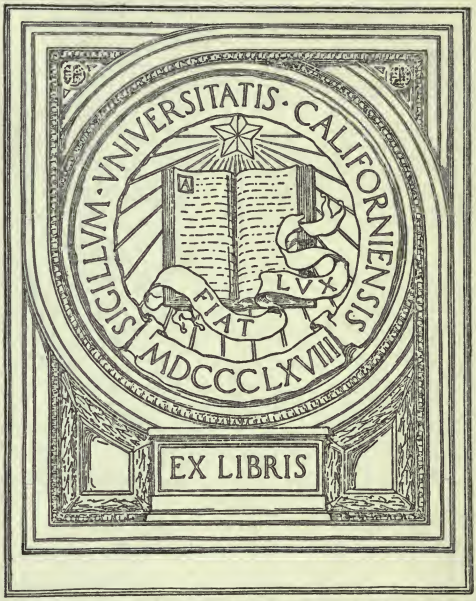
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OBSERVATIONS

ON

THE ORIGIN OF THE

TRIAL BY COUNCIL OF WAR,

OR THE PRESENT

COURT-MARTIAL.

BY

G. NORMAN LIEBER,

JUDGE ADVOCATE,

U. S. ARMY.

NEW YORK:

1876.

ORIGIN OF

THE TRIAL BY

COUNCIL OF WAR.*

During the second quarter of the seventeenth century the English system of administering military law underwent a radical change. Since the Conquest the only legally recognized military court had been the Court of Chivalry, or Marshal's Court, presided over by the High Constable, who was the Commander-in-Chief, and the Marshal, who, from being Superintendent of the Stables, or Chief of Equerries, had risen to the second place in the Army. The office of High Constable was hereditary in certain families until the reign of Henry VIII.

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* Note.—When the old Court of Chivalry, or Marshal's Court, went into disuse, the tribunal which took its place was called the *Council of War*, or *Court Martial*. The first of these two names, however, soon gave way to the latter, which, in England, is now applied to all courts for the enforcement of military, as well as martial, law. In this country we call the martial law courts *Military Commissions*. It is, however, a designation of recent origin. When General Scott, in October, 1846, drew up his "Projét" for martial law in Mexico, he fixed upon the term "*Council of War*" as an appropriate one for these tribunals, but changed it to "*Military Commissions*" in his celebrated order of September 17th, 1847, issued at the city of Mexico, and the name thus affixed to the court has, with us, become its permanent designation.

It had by that time grown to such a dangerous height of authority, that the king abolished it as an hereditary office; nor was it afterwards revived except for the special purpose of a temporary exercise of its judicial powers. The last instance of this kind occured in 1631, upon an appeal of treason brought by Donald Lord Rae against David Ramsay, when Robert, Earl of Lindsay, was appointed High Constable, and a Court of Chivalry constituted, consisting of the Constable, the Earl Marshal, and ten others of the officers of state and principal nobility, to "hear, decide, and bring to final sentence this cause, and do therein according to the law and custom of armies, and the usage of the Military Court of England."

The difference between the parties in this case was adjudged to be settled by a public duel, but the judgment, at first approved by the King, was afterwards set aside as a relic of barbarism.

The presence of the High Constable had not always, however, been regarded as necessary to the legal constitution of the court. For a long time it was held by the Marshal alone, and the legality of his exercise of judicial powers without the Constable, during a vacancy in that office, was sustained in the reign of James I, by the decision of the Lord Keeper, the Master of the Rolls, and other lords of the Privy Council. But this decision was reversed in the succeeding reign by the Lord Keeper and judges of the King's Bench, and the court in Ramsay's case was formed agreeably to the latter decision.

At the time of Richard II, the Marshal's Court had usurped jurisdiction to such an extent that it became necessary to restrain it by statute, and its legal jurisdiction was accordingly defined as follows:—

"To the Constable it pertaineth to have cognizance of contracts touching deeds of arms and of war out of the realm, and also of things that touch war within the realm, which cannot be determined nor discussed by the common law, with other usages and customs, to the same matter pertaining, which other Constables heretofore have duly and reasonably used in their time."

Yet the commission of High Constable granted to the Earl of Rivers, more than a century later, shows that the law was not respected. The criminal jurisdiction of the court appears to have then again extended to a great variety of undefined offences, and to have been exercised by the High Constable without any regulated form of trial, and without restriction as to punishment, no appeal to the king even being allowed against his decrees.

The most flagrant of these abuses were subsequently corrected, but the jurisdiction of the court was never confined within the constitutional limits as fixed by the statute of 13th Richard II.

Rushworth gives, in his Historical Collections, a few cases which show to what illegal purposes the court was perverted during the last years of its existence. "Many," he says, "were the complaints by way of Libel (the court proceeding according to the civil law) against others, for giving a gentleman words tending to the defamation of a family well descended.

"As for instance, one Brown set forth in libel his descent; that another person, in way of defamation, said he was no gentleman, but descended from Brown, the great Pudding-eater in Kent; but it appearing he was not so descended, but from an antient family, he that spake the words underwent the sentence of the court, and was decreed to give satisfaction by the party complaining.

"In another case, a citizen of London was complained of, who going to a gentleman, well descended, for some money that was due unto him, the gentleman not only refused to pay him the money, but gave him hard words; then, said the citizen, surely you are no gentleman that would not pay your debts, with some other reflecting language, and the citizen underwent the censure of the court."

In 1640 the Commons appointed a committee "to consider of the proceedings and power of the High Constable and Earl Marshal's Court, and to report the state of the whole matter to the House."

The Committee reported: That the court had no jurisdiction to hold plea of words; that the Earl Marshal could make no court without the Constable; and that the Earl-Marshal's Court was a grievance.

The House confirmed these opinions by several votes, and gave further power to the committee:—

"1. That they do consider who they are that are guilty of this grievance by the Earl-Marshal's Court.

"2. To consider of the nature of the crime which they are guilty of.

"3. That they prepare and draw up a charge, to be transmitted to the Lords, against those who have thus, to the grievance of the subject, usurped this jurisdiction."

The Court of Chivalry was never formally abolished, but its usurpations became so offensive to the people that it gradually and quietly passed out of existence. Its civil jurisdiction was remitted to civil tribunals, and for the exercise of its military jurisdiction a system was established which, confirmed by statutary law, is in force to-day.

Before the passage of the first Mutiny act in 1689, the law of England did not, in point of fact, recognize any separate code for the government of the army at home in time of peace. The reason is obvious. It was a natural consequence of a long series of usurpations of military power, and the growing fear of a standing army, expressed in the Bill of Rights by the announcement of the constitutional principle that a standing army in time of peace, without the consent of Parliament, is against the law. Until the Restoration there was no permanent military peace establishment in England. The "hus-carls" of the Danish Kings of England have been spoken of as the foundation of the English standing army. They constituted a permanent body of household troops, it is true, and were not dismissed with the rest of the army at the end of a war, but they did not constitute a legal peace establishment, nor the nucleus of a standing army. This was the legitimate off-spring of the mutiny act alone. Soon after his accession, Charles II. begun, indeed, to form a permanent force, but it was so little recognized

by Parliament, that he was compelled to pay it out of his own revenues. "The discipline" says Macaulay, "was lax; indeed it could not be otherwise. The common law of England knew nothing of courts-martial, and made no distinction, in time of peace, between a soldier and any other subject."

Armies had before this been raised for service abroad, or for war within the realm, and, when thus engaged, were subject to articles of war issued by the sovereign by virtue of his prerogative. But the prerogative did not extend to putting forth articles for the government of the army at home in time of peace, and so jealous were the people of any encroachment upon the civil power, that no government dared even to ask for a bill establishing a military code.

James II. illegally increased the army until it numbered about 40,000 men, but he was not vested by law with the power of controlling this force. He did, in fact, issue articles of war for the purpose, but it was an illegal usurpation of power. He claimed that he could, by virtue of his prerogative, and without an act of Parliament, enforce "martial law" against military men at all times, but the question was decided against him: first by Sir John Holt, then Recorder of London, and afterwards by Lord Chief Justice Herbert, who decided that, without an act of Parliament, all laws were equally applicable to all his majesty's subjects, whether wearing red coats or grey. *By law*, therefore, the soldier was at this time subject in every respect to the same law as other subjects. Says Macaulay, "When war was actually raging in the kingdom. a mutineer or deserter might be tried by a military tribunal and executed by the provost-marshal. But there was now profound peace. The common law of England having sprung up in an age when all men bore arms occasionally, and none constantly, recognized no distinction in time of peace between a soldier and any other subject." It follows that at law there was no distinction between the soldier and his officer. If the soldier swore at his commander, he incurred no penalty save a fine for his oath; if he struck him, he committed no offence save assault and battery.

Such was the law at the time of the passage of the first mutiny act. The necessity of a change in the law was then recognized —the mutiny of the "Royal Scotts" giving a practical proof of the necessity, and facilitating the change. The new law was very imperfect. Mutiny, sedition and desertion were the only offences made punishable by military law, and the omission was not supplemented by any authorization of the sovereign to put forth articles which should be in force within the realm in time of peace, nor was this done until the year 1717. By this law, however the court-martial was first legally established as the regular tribunal for the trial of military offences in England, in *time of peace.* The court had, indeed, already become a feature of English history, and of English law, so far as it was resorted to in time of war, or beyond the realm. To this extent its creation was, no doubt, within the limits of the royal prerogative. It had been used, also, for the trial of military offenders in time of peace, within the realm; but it had no legal existence for this purpose before the date of the first Mutiny act of William and Mary.

The articles of war issued by Charles I. in 1629, still confided the administration of military justice to the Marshal's court. In 1639 we meet with the first indication of a departure from the old system Articles were then promulgated by the Earl of Arundel, commander-in-chief of the Northern Army, under authority conferred upon him by his commission, to hear, examine and debate, himself or *by deputies*, all causes, both criminal and civil, arising within the army. By these articles, which are regarded as the foundation of our present military code, the administration of justice was entrusted to "the Councell of Warre" or "Court Marshall," and the Advocate of the Army—subject, however, to the "Lord Generall's" exercise of the power vested in him by his commission. Arundel was also Earl Marshal of England, but it was as Lord General—a position corresponding to the old office of High Constable—and not as Earl Marshal, that he assumed to exercise and delegate the power.

The articles of the Earl of Northumberland. which bear date 1640, also recognized the "Councell of Warre." "All controversies between souldiers and their captains, and all others," said these articles, "shall be summarily heard and determined by the *Councell of Warre*, except the weightinesse of the cause require further deliberation."

Essex adopted this provision, word for word, in the articles which he issued in 1642, under an ordinance of Parliament, and which are sometimes spoken of as the "Parliamentary Articles." So, the articles and ordinances published to the army of Scotland in 1643, recognized the "Court of War" or "Martial Court" as the regular tribunal for the trial of military offences.

Of this thus newly established court Grose (Mil. Antiq., vol. II. p. 54,) says: "As the commissions of most of the commanders-in-chief contained a clause authorizing them to enact ordinances for the government of the army under their command, and to sit in judgment themselves, or to appoint deputies for that purpose, it seems in some degree imperceptibly to have encroached on the independency of the Marshal's Court, and at length to have taken a new form under the denomination of the Court or Council of War, which sat at stated times, or was ordered by the commander-in-chief, and at which officers of a certain rank, apparently not under that of a colonel, had a right to sit as assessors or members, and, instead of the Marshal, we hear of an officer styled president of the higher court of war, who, on certain occasions, claimed the privilege of a double vote."

From a manuscript dated 1649, entitled, "A Brief Treatise of Warr, &c.," Grose extracts the following description of the duties of the president of the court:—

"The next in order I conceive to be the president of the high court of war, whose place requireth him to be a person of honour, integretie, of sound judgment, of ripe knowledge in civil and military laws, before whom all matters, civil and criminal, that have relation to the army are to be tryed, and, therefore, he ought to be assisted with a learned fiscal or judge advocate, as also with a well experienced auditor, to audit and keep regi-

ster of all cases and matters that shall be brought before the court of war.

"His office is to assemble the court of war as often as the general shall please for to appoint him, and in the interims he is to prepare all busyness and causes, so that the court of war may have a clear and just information of all things; and when that any busyness shall come into a final sentence, he shall have the priviledge of a double voice, because he represents the general's person."

During the reign of Charles II. the trial by court-martial was further developed. By the code of 1666—the second of that reign—the administration of military justice was, for the first time, divided between "general," "regimental," and "detachment" courts. The general court-martial was appointed by the commander-in-chief, consisted of thirteen officers, and had jurisdiction of offences punishable with life and limb. Regimental courts-martial were for the trial of minor offences committed by soldiers. Detachment courts-martial had the same powers as the regimental courts, but were appointed by the governors of garrisons, who, for this purpose, were authorized to call in officers from neighbouring garrisons to make up the detail.

By these articles no field officer was to be tried by any officer under the degree of captain. This distinction as to rank was afterwards still further extended, for, according to the directions issued by James II. in 1686, the lieutenants, sub-lieutenants and ensigns were not in any case eligible except when there was not a sufficient number of captains available. "The lieutenants, sub-lieutenants and ensigns have right to enter into the room where the councel of war (or court-martial) is held," say these directions, "but they are to stand at the captains' backs with their hats off, and have no vote." According to the first mutiny act, also, field officers could only be tried by field officers, and no member of any court could be under the degree of captain.

The system thus established in England is still in force there, and has come to us as part of our inheritance from the mother country. In both countries the court-martial is the only legal tribunal for the trial and punishment of offences arising under

the law military. This system has heretofore been regarded as one of spontaneous growth in England, yet there are circumstances which strongly indicate, if they do not conclusively prove, its continental origin.

At the time when changes in the law military began to be introduced in England, Europe was involved in the Thirty Years' War. That war had fixed the eyes of the world upon Gustavus Adolphus as the greatest military organizer of the age. Directly or indirectly his influence was perceptible far beyond his immediate sphere of action. His military arrangements, including the regulations by which he governed his troops, were widely studied and imitated. In England his articles of war were translated and printed, as a pattern code, in Ward's "Animadversions of Warre." This work was published in 1639;* the articles had been promulgated to the Swedish army in 1620. They contained the following provisions for the administration of justice:—

"ARTICLE 135. Very requisite it is, that good justice be holden amongst our souldiers, as well as amongst other our subjects.

"136. For the same reason was a King ordained by God to be the Sovereign Judge in the field as well as at home.

"137. Now therefore in respect of many occasions which may fall out, his single judgement alone may be too weak to discerne every particular circumstance; therefore it is requisite that in the Leaguer, as well as otherwhere, there be some court of justice erected for the deciding of all controversies; and to be carefull, in like manner, that our Articles of Warre be of all persons observed and obeyed so farre forth as is possible.

"138. We ordaine, therefore, that there be two Courts in our Leaguer, a high Court and a lower Court.

"139. The lower court shall be amongst the Regiments, both of Horse and Foot, whereof every Regiment shall have one among themselves.

"140. In the Horse Regiments the Colonel shall be President, and in his absence the Captaine of our own Life-guards;

* A copy of it is in the possession of General J. W. De Peyster, who has kindly permitted the writer to make use of it.

with them are three Captains to be joyned, three Lieutenants, three Cornets, and three Quarter-masters, that so together with the President they may be to the number of thirteen at the least.

"141. In a Regiment of Foot the Colonell also shall be President, and his Lieutenant-colonell in his absence; with them are two Captains to be joyned, two Lieutenants, two Ensignes, four Sergeants and two Quarter-masters; that together with the President they may be thirteene in number also.

"142. In our highest Marshall Court shall our Generalls be President; in his absence our Field Marshall; when our Generall is present, his associates shall be our Field Marshall first, next him our Generall of the Ordnance, Sergeant-Major Generall, Generall of the Horse, Quarter-master-Generall; next to them shall sit our Muster-Masters and all our Colonells, and in their absence their Lieutenant-Colonells, and these shall sit together when there is any matter of great importance in controversie.

"143. Whensoever this highest Court is to be holden, they shall observe this order: Our great Generall, as President, shall sit alone at the head of the table, on his right hand our Field Marshall, on his left hand the Generall of the Ordnance, on the right hand next our Sergeant-Major Generall, on the left hand againe the Generall of the Horse, and then the Quarter-master Generall on the one hand and the Muster-Master Generall on the other; after them shall every Colonell sit according to his place, as here followes: first the Colonell of our Life regiment, or of the Guards of our owne person, then every Colonell according to their places of antiquity. If there happen to be any great men in the Army of our subjects, that be of good understanding, they shall cause them to sit next these officers, after these shall sit all the Colonells of strange Nations, every one according to his antiquity of service.

"144. All these Judges, both of higher and lower Courts, shall under the blue skies thus sweare before Almighty God, that they will inviolably keep this following oath unto us:

"I, R. W., doe here promise, before God, upon his holy Gospell, that I both will and shall judge uprightly in all things

according to the Lawes of God, of our Nation, and these Articles of Warre, so farre forth as it pleaseth Almighty God to give me understanding; neither will I for favour nor for hatred, for good will, feare, ill will, anger, or any gift or bribe whatsoever, judge wrongfully; but judge him free that ought to be free, and doom him guilty that I finde guilty; as the Lord of Heaven and Earth shall keep my soule and body at the last day, I shall hold this oath truly.

"150. Our highest Court shall be carefull also to heare and judge all criminal actions, and especially cases of conspiracy or treason practised or plotted against us, or our Generall, either in word or deed; secondly, if any gives out dishonorable speeches against our Majesty; thirdly, or consulteth with the enemy to betray our Leaguer, Castle, Towne, Souldiers or Fleet, any way whatsoever; fourthly, if there be any partakers of such treason or treachery, and reveale it not; fifthly, or any that hath held correspondency and intelligence with the enemy; sixthly, if any hath a spite or malice against us or our country; seventhly, if any speake disgracefully, either of our owne or our Generall's person or indeavours; eighthly, or that intendeth treachery against our Generall or his Under Officers, or that speaketh disgracefully of them.

"151. All questions in like manner happening betwixt officers and their souldiers, if they suspect our lower Court to be partiall any way, then may they appeale unto our highest Court, who shall decide the matter.

"152. If a Gentleman or any Officer be summoned to appear before the lower Court for any matter of importance that may touch his life or honour, then shall the same be decided by our higher Court.

"155. Any criminal action that is adjudged in our lower Court, we command that the sentence be presented unto our Generall; we will not have it presently put in execution, untill he gives command for it in our absence. But ourselves being in person there present, will first take notice of it, and dispose afterwards of it, as we shall think expedient.

"156. In our higher Court, the Generall parforce, or his Lieutenant, shall be the Plaintife, who shall be bound to follow the complaint dilligently, to the end he may the better informe our Councellors who are to doe justice; if it be a matter against ourselves, then shall our owne Advocate defend our action, before our Court.

"157. The same power the Parforce of every Regiment shall have in our lower Court, which Parforce shall be bound also to give notice of every breach of these Articles of Warre, that the infringer may be punished.

"159. Whensoever our highest Court is to sit, it shall be two hours before proclaimed through the Leaguer, that there is such an action criminall to be there tried, which is to be decided under the blue skies; but if it be an action civill, then may the Court be holden within some tent, or otherwhere; then shall the souldiers come together about the place where the Court is to be holden, no man presuming to come too neere the table where the Judges are to sit; then shall our Generall come foremost of all, and the other his associates, two and two together, in which order, they all coming out of the Generall's tent, shall set themselves down in the Court, in the order before appointed; the Secretarie's place shall be at the lower end of the table, where he shall take diligent notice in writing of all things declared before the court; then shall the Generall Parforce begin to open his complaint before them, and the contrary party shall have liberty to answer for himselfe, untill the Judges be thoroughly informed of the truth of all things.

"161. The matter being thoroughly opened and considered upon, and our whole Court agreeing in one opinion, they shall command their sentence concerning the same action, to be publikely there read in the hearing of all men, always reserving his Majestie's further will and pleasure.

"162. In our lower Court they shall also hold the same order; saving that the particular Court of every Regiment shall be holden in their owne quarters.

"163. In this lower Court they shall always observe this order, namely: that the President sits at the lords' end alone,

the Captains, Lieutenants and Ensignes on either side; so many inferiour officers also upon each side, that so they may the better reason upon the matter amongst themselves; last of all shall the Clerk or Secretary sit at the lower end of the table; the one party standing upon one hand, the other upon the other."

There is a striking resemblance between the system thus established and that which soon afterwards made its appearance in England. But the resemblance is not limited to the method of administering military justice; it is evident also in the penal provisions. Considering, therefore, their chronological relations, there is good reason to believe that the English codes of the Seventeenth Century were the offspring of the Swedish code. But the latter does not present the earliest instance of this form of military trial. Councils of war had for many centuries already been resorted to by different European governments. Under the Emperor Charles V. we find this form of military trial regulated with great detail, and, indeed, cumbrous formality. The commanders of his regiments possessed the power of administering certain disciplinary punishments without resorting to military tribunals. Offences against the articles of war, and doubtful cases were, however, referred to a court which the regimental commander, the judge advocate, or other officer deputed by the regimental commander, was authorized to convene, and over which such officer presided. The court consisted of twelve, or, in important cases, twenty-four, fit persons—officers and soldiers—selected from the regiment. These were the assesors. They were judges of the law and the fact, deciding on the guilt and punishment, and giving their votes separately.

On the opening of the court the judge advocate, or other presiding judge, administered the following oath to the members: "We, the Judges, vow and swear by God and his Holy Gospel that we will help rightly to judge and determine the present complaints and answers, accusations and defence, according to our best understanding and judgment, for the poor as the rich, and for the rich as the poor, without regard to person; according also to the Divine and imperial law, and particularly according to the Articles of War and their published commands and

prohibitions; and this we will do neither for favor, friendship, or other tie, nor for fear, enmity, hate, envy or ill-will, much less for any present or bribe; and least of all will we acquit the guilty, or condemn the innocent; but will judge in such manner that we may all be answerable to the All-just, Great and Almighty God, before his strict tribunal and to our (name of the sovereign); so help us God through Jesus Christ his Son."

After the oath had been taken, which was done with uplifted hands, and by repeating the words, a number of formalities followed, amongst them the formal questioning of the court by the judge advocate, as to the appropriateness of the time, and the fitness of the members. The accused was then regularly arraigned on a written complaint, to which he was allowed to plead in detail. He was also allowed to produce evidence in defence and to have counsel, and might even select his counsel from amongst the members of the court. However strict the code may have been which these courts administered, we find the accused here hedged around with many of the most important safe-guards which protect him before our military courts to-day.

Going back to the time of the Carlovingian dynasty, we meet with a system similar in some respects, but with one marked point of difference. That which has just been considered had for its object the administration of the law military only. Crimes of a civil nature did not fall within its jurisdiction. This principle—the severance of the civil and military power—had already been observed by the Romans. It did not, however, enter into the Carlovingian system. Under the monarchs of this line the territorial lord presided over the courts of justice within his jurisdiction. In time of war he became military commander and his subjects became his soldiers. He still exercised civil jurisdiction over them, but, in consequence of the military relation, a military jurisdiction also. Exercised by the same authority, and administered through the same machinery, the two were, however, blended together.

Trials were conducted publicly, orally, and with a prosecutor; the courts were presided over by the suzerain, or his representatives, to whom were joined at first seven, and afterwards (by

an order of Lewis le Debonnaire in 819) twelve judges—*Scabini*. The duties of these judges corresponded with those of the members of the modern court-martial—they determined the question of guilt or innocence, and, in case of conviction, awarded the punishment.

At a later period the administration of civil and military justice was separated, but the machinery, which had been in use when the two jurisdictions centred in the same authority, was retained for the military court. and out of it grew the better defined and more perfect systems which have been mentioned. So that, the trial by council of war appears to be an out-growth of the judicial system of these early days—an application to the law military of the principles which regulated the ordinary trial.

The composition of courts-martial on the European continent during the 16th and 17th centuries varied somewhat with time and place. The number of members was generally either eleven or thirteen. In the army of the German Empire the judge advocate had a vote; in other armies he was simply prosecutor. It was no uncommon thing for soldiers, below the degree of officer, to be eligible as members. They were so—as already stated—by the codes of Charles V., and Gustavus Adolphus. In Schleswig-Holstein courts-martial were composed of the president, two captains, two lieutenants,, two ensigns, two sergeants, two corporals, and two of the same rank with the accused. In England there existed at one time a court known as the "*Company Court-Martial*," which was assembled by the captain and consisted of the privates of the company. The court took jurisdiction in such matters as stealing from a comrade, and awarded corporal punishment. It never, however, had any legal existence, and on that account was abandoned.

There are thus many features possessed in common by the English and the continental systems which, examined in connection with the circumstances under which the English code was adopted, seem to prove the identity of their origin. The trial by council of war—the court-martial—cannot, therefore, it is believed, be regarded as a purely English, or as an originally English, institution. On the contrary, it appears to have been

transplanted to England, there to have found a congenial atmosphere, and to have been at once adopted, and ever since retained, as far better adapted to its ends than any other system that could be devised; whilst, on the other hand, on the continent, where it originated, it gradually gave way to the inquisitorial method of proceeding.